



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 19, 1994

Mr. Don R. Bradley
Attorney
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR94-459

Dear Mr. Bradley:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), chapter 552 of the Government Code (formerly V.T.C.S. article 6252-17a).¹ Your request was assigned ID# 22458.

The Texas Department of Health (the "department") has received an open records request for information relating to an investigation of a particular department employee. This information includes complaints against the employee for intimidation, harassment, verbal abuse, and sexual harassment. The department claims that this information is protected from disclosure under the informer's privilege component of section 552.101 of the Government Code.

The informer's privilege is in reality the government's privilege to protect the identities of individuals who furnish information regarding violations of the law to officers charged with enforcing the law. Open Records Decision Nos. 549 (1990) at 4-5; 515 (1988) at 2. The informer's privilege serves to encourage the flow of information to the government by protecting the identity of the informer. *Id.* The basis for the informer's privilege is to protect informers from the fear of retaliation and thus encourage them to cooperate with law enforcement efforts. *Id.* Although the privilege ordinarily applies to the efforts of law enforcement agencies, it can apply to "administrative officials having a duty of inspection or of law enforcement within their particular

¹The Seventy-third Legislature has repealed article 6252-17a, V.T.C.S. Acts 1993, 73d Leg., ch. 268, § 46. The Open Records Act is now codified in the Government Code at chapter 552. *Id.* § 1. The codification of the Open Records Act in the Government Code is a nonsubstantive revision. *Id.* § 47.

spheres.'" Open Records Decision No. 285 (1981) at 1 (quoting Open Records Decision No. 279 (1981) at 1-2; *see also* Attorney General Opinion MW-575 (1982); Open Records Decision No. 515. However, once the identity of an informer is disclosed to those who would have cause to resent the communication, the privilege is no longer applicable. Open Records Decision No. 202 (1978).

We have examined the information you have submitted as Exhibits B-R for which the department seeks the informer's privilege protection. In this instance, it appears that much of the behavior complained of in these exhibits was not criminal. Most of the information pertains primarily to complaints from public employees about the job performance of another public employee in his duties as a public servant and, as such, is not the kind of information protected by the informer's privilege. *See, e.g.*, Open Records Decision No. 515 at 5. Although in one instance the behavior complained of could be considered criminal in nature, such a violation of the law is not enforceable by the department. *Id.* The informer's privilege applies to communications made to administrative officers who have a duty to enforce specific laws, and not to administrative officials in general. *Id.* In this case, the department can impose administrative sanctions on the employee in question; it cannot criminally prosecute him for his actions. Moreover, you do not contend that the department intends to refer the matter to a law enforcement agency for criminal prosecution. We therefore conclude that the requested information is not excepted from disclosure by the informer's privilege component of section 552.101.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."² Information may be withheld on the basis of common-law privacy under section 552.101 if it is highly intimate or embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and there is no legitimate public interest in its disclosure. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977); Open Records Decision Nos. 579 at 2; 562 at 9; 561 at 5; 554 at 3 (1990); *see also* *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W. 546, 550 (Tex. App.--Austin 1983, writ ref'd n.r.e.).

A recent court decision, *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigatory files in *Ellen* contained individual witness and victim statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Id.* The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry,

²Although the department does not contend that the common-law privacy aspect of section 552.101 applies to the information regarding the allegations of sexual harassment, the attorney general will raise section 552.101 when a governmental body fails to do so. Open Records Decision No. 325 (1982); *see also* Open Records Decision No. 344 (1982).

stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.*

The *Ellen* decision partially controls the release of the documents you have submitted for our review that relate to the allegations of sexual harassment. Because there are no documents resembling an "affidavit of the person under investigation and the conclusions of the board of inquiry," we believe there is a legitimate public interest in the specific allegations of sexual harassment. However, the identities of the victim and witnesses to the alleged sexual harassment are excepted from disclosure by the common-law invasion of privacy doctrine as applied in *Ellen* and *Industrial Foundation*. We have marked the types of information that you must withhold under the doctrine of common-law privacy to protect the identities of the complainant and other witnesses; the remaining information must be disclosed.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



Loretta R. DeHay
Assistant Attorney General
Open Government Section

LRD/JCH/rho

Ref.: ID# 22458

Enclosures: Marked documents

cc: Mr. Horacio Barrera, Jr.
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(w/o enclosures)